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Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 272 and 377

RESERVE LIFE INSURANCE COMPANY, ET AL.,
Petitioners,

vs.

BANKERS LIFE AND CASUALTY COMPANY, ET AL.,
Respondents.

BRIEF ON BEHALF OF RESPONDENT BANKERS LIFE AND CASUALTY COMPANY

IN OPPOSITION TO PETITION AND CROSS-PETITION FOR WRIT OF CERTIORARI.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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ARGUMENT.

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1. THE PETITION.

Respondent Bankers Life and Casualty Company, herein called "Bankers", respectfully submits that the petition does not make a showing sufficient to invoke the exercise by this Court of its sound judicial discretion to grant review on Writ of Certiorari.

The petition contends that a summary judgment ren-

dered by the District Court should not have been reversed by the Court of Appeals.

It seeks to have this Court undertake to review hundreds of pages of depositions, affidavits and evidentiary exhibits for the purpose of determining whether the Court of Appeals was right in deciding that the record presented genuine issues as to material facts triable only "on the merits" and not on motions for summary judgment.

The summary judgment was against Bankers as plaintiff in an action under Section 1 of the Sherman Act, as amended, 15 U. S. C. Section 1,[1] and Section 4 of the Clayton Act, 15 U. S. C. Section 15.[2]

It was brought to recover treble damages for injury to Bankers' interstate insurance business resulting from a conspiracy among petitioners, respondent Larson and others.

Petitioners inferentially admit the conspiracy. They also inferentially admit that it injured Bankers' interstate insurance business. This injury, they say, was only a *private injury* as distinguished from *injury to the public.*

Arguing that it was necessary for Bankers to show both private and public injury, and pointing to affidavits submitted in support of the Motions for Summary Judgment, petitioners assert that the affidavits proved conclusively that the conspiracy had not injured the public.

In disposing of this contention the Court of Appeals said (Petition, Appendix "A", pp. 8-9):

"Of appellees' point one, of which they make so much

1. "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *."

2. "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws * * * shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

in citing and discussing the cases, that the complaint does not allege and the proof does not show any injury to the public and for that reason no case for relief is presented, it is sufficient to say that in our opinion, as applied to this case, appellees have completely misconceived and misapplied the principle they invoke. As to the complaint, there are clear, definite and full allegations that the conspiracy charged against the defendants was for the purpose and with the result not only of unlawfully restraining plaintiff's trade and commerce among the several states but of suppressing, burdening and obstructing interstate commerce, *thus alleging at once both public and private injury.*

"As to proof, we think it quite clear that here, as in other aspects of the case, appellees have not borne their burden of demonstrating that as matter of law there was no evidence which, if taken in the light most favorable to plaintiff, tended to establish the truth of its allegations." (Emphasis supplied.)

This disposition of petitioners' contention obviously does not conflict with any decision cited in the petition. Neither does it call for an exercise of this Court's power of supervision. There is nothing in the case to invoke the exercise of sound judicial discretion to grant review.

2. THE CONSPIRACY.

Even a brief summary of the history, nature and consequences of the conspiracy demonstrates conclusively that the disposition of petitioners' contention by the Court of Appeals was right.

When the action was commenced on April 24, 1952 and a jury trial demanded (I, 26),[3] Bankers was an insurance company writing life, health and accident, and hospitaliza-

3. This is a reference to Volume I of the record, page 26. Subsequent record references usually are in the same form.

tion insurance in 31 states through more than 4,000 agents and employees. (I, 5-8.)

The former defendant Zack D. Cravey and respondent Larson are, respectively, Insurance Commissioners of the States of Georgia and Florida. Cross-petitioner Hartford Accident and Indemnity Company was the surety on the official bond of Commissioner Cravey of the State of Georgia.

Petitioners are members of a group of insurance companies controlled and dominated by one C. A. Sammons. The former defendant C. C. Bradley was vice president of petitioner Reserve Life Insurance Company.

Inasmuch as no point is raised in the petition relative to the conspiracy itself, it is sufficient to point out as background that the plan was for Commissioners Cravey and Larson under the guise of regulation, to eliminate Bankers as a competitor in Georgia, Florida and elsewhere; to throw its agency plants and business to petitioners and by enlisting the aid of other Commissioners prevent its expansion into other states.

The conspiracy is revealing of gross contempt for legal limitations on official authority and a shockingly mercenary attitude toward bribery and corruption.

The means of purported regulation were threats and the instigation of threats that Bankers' license to do business would not be renewed, or actual refusal of renewal licenses,[4] at such times and in such ways as would facilitate carefully planned and highly successful concerted efforts by the Sammons controlled corporations (Petitioners) to obtain the agency forces and thus the business of Bankers

4. "Counsel for the Commissioner * * * sought to draw a distinction between revocation and refusal to renew a license. There is no difference in substance between the two." *Bankers Life & Casualty Co.* v. *Cravey*, 208 Ga. 682, 69 S. E. 2d 87, 90 (1952).

in various states. (I, 10-19.) To that end Larson and Cravey enlisted the aid of Commissioners of other states, so that the scheme of the conspiracy became national in scope. (I, 9, 13-15, 20-21.) The Sammons controlled corporations maintained the adherence and cooperation of Larson and Cravey through bribery of commissioners and their employees. (I, 16.) Officials of these corporations were active participants in diagramming both the scheme and moves which would assure its success for the benefit of the corporations. (I, 15, 18, 22.) Sammons refused to answer on the grounds of the Fifth Amendment, questions concerning bribery of Cravey, Larson, and other insurance officials.[5] Sammons likewise refused to answer on the ground of self-incrimination, a question as to whether he had received a report from Bradley in 1951 to the effect that cooperation for the corporate conspirators (petitioners) had been secured by the payment of sums of money to insurance department officials in the states where the companies operated. (I, 161, 162, 163, 165, 166.) Nevertheless, petitioners' well-planned secret campaign of bribery of employees of Cravey and other public officials is demonstrated in the record. (I, 430; II, 559 through 572, 576; IV, 1945, 1951.)

The conspiracy was wholly successful in Georgia where Bankers has been at all times since July, 1951 and still is prevented from writing insurance and having agents,[6]

5. An objection to the question and instruction to the witness not to answer on the grounds that the answer might tend to incriminate him, first appears in Vol. I at page 161. Thereafter it was referred to as "same objection and same instruction" to the witness. (I, 162 *et seq.*); No such privilege was legally available to witness. Title 15, Section 32, U. S. C. A.

6. *Bankers Life & Casualty Co.* v. *Cravey*, 208 Ga. 682, 69 S. E. 2d 87, (1952); *Cravey* v. *Bankers Life & Casualty Co.*, 209 Ga. 273, 71 S. E. 2d 659, (1952); *Bankers Life & Casualty Co.* v. *Cravey*, 209 Ga. 274, 71 S. E. 2d 659, (1952); *Bankers Life & Casualty Co.* v. *Cravey*, 210 Ga. 239, 78 S. E. 2d 507, (1953); 90 Ga. App. 113, 82 S. E. 2d 150, (1954).

and to a large and damaging extent in Florida, Pennsylvania, and elsewhere. The only thing that saved Bankers' business from extinction in Florida was that the Florida litigation prevented Larson from carrying through fully his portion of the scheme (V, 2513-20); *Larson* v. *Bankers Life and Casualty Co.*, Fla., 64 So. 2d 322 (1953). Even then, press releases by Cravey falsely stated that Bankers had lost its licenses in Florida and Iowa. (III, 1358-60, Pl. Ex. 4, particularly on page 1360, the concluding sentence of the newspaper clipping.)

This terse summary of the evidence contained in the more than 3000 pages of the record emphasizes the validity of the Court of Appeals' finding that Bankers was entitled to have a jury pass upon the issues of the case.

3. PUBLIC INJURY.

The petition for certiorari seeks to invoke this Court's interest by portraying the lower Court's opinion as inconsistent with and contrary to the reported decisions of this Court and of eight Courts of Appeal. Reference to all of the facts and not merely those culled by petitioners in an earnest effort to advance their best legal foot forecloses the conclusion that the Court of Appeals has trespassed in the manner attributed to it by petitioners.

It should be noted that the issue of "public injury" was advanced by the petitioners in the District Court, but was ignored by that Court in its disposition of the case. The Court of Appeals, in dealing with this facet of petitioners' argument, found that the complaint charged both public and private injury and that the evidence when taken in the light most favorable to the plaintiff tended to establish the truth of the allegations.

These findings of the Court of Appeals are not disputed in the petition. Indeed they cannot be disputed against the

background of the conspiratorial meetings; the interchange of "Personal," "Confidential," and "Not for File" messages; the careful meshing of petitioners' activities directed at capturing Bankers' business in Georgia and elsewhere with Cravey's actions in putting Bankers out of business in Georgia; the bribery of insurance department officials and employees; and the spectacle of the controlling figure in petitioners' corporate set-up advancing an ill-founded claim of the privilege against self-incrimination in reply to questions concerning these acts of bribery. There can be no question that interstate commerce in a substantial amount was suppressed, burdened, and obstructed as a result of petitioners' activities.

Bankers lost an agency force of one hundred and eleven men in Georgia alone (V. 2714) valued at a figure in excess of three million dollars (V. 2723). In that same state, Bankers at the time of the actions complained of in 1951 accounted for almost 1/3 of the total premiums paid in the state for accident and health insurance excluding non-cancellable policies. (V. 2775.) The dollar value of these premiums was substantial. In that same year, the premiums were in excess of a million dollars. (V. 2775.) Petitioners during this same period, considered as a group, were slightly ahead of Bankers in both percentage and dollar volume.

In discussing the effect of the refusal to renew the Georgia license, the State Supreme Court said:[7]

> "• • • Beyond doubt the company's operation in this State has been mutually beneficial to the company, the State and the people of the State. It has approximately 87,000 policyholders and 75 soliciting agents in Georgia. During the first six months of 1951 the company paid to its policyholders in Georgia $241,529.45. In February of 1951 it paid to the defendant

7. *Bankers Life & Casualty Co. v. Cravey*, 208 Ga. 682, 69 S. E. 2d 87, 89 (1952).

> Insurance Commissioner $300 as the annual fee for the renewal of its license for the fiscal year beginning July 1, 1951, and $18,000 in taxes. This mutually beneficial operation has been abruptly terminated by the Insurance Commissioner * * *."

This beneficial interstate insurance operation has been at all times since July, 1951, and still is, completely suppressed in the state of Georgia.

Because Bankers has not had and does not have agents in Georgia, the interstate servicing of the approximately 87,000 policies held in that state has been and still is burdened and obstructed. These policyholders have been and are deprived of local agents to assist in servicing the policies, claims and collections of premiums.

The people of the state of Georgia have been and are deprived of the right to obtain Bankers' policies.

The economy of the state of Georgia has been and is deprived of the economic benefit of the compensation formerly paid by Bankers to its Georgia agents and other employees.

The state of Georgia has been deprived of approximately $2,100.00 in license fees which Bankers would have paid if its interstate insurance business had not been completely suppressed in that state.

The state of Georgia also has been deprived of approximately $126,000.00 in taxes which Bankers would have paid if its interstate insurance business had not been completely suppressed in that state.

The "continuous and indivisible stream of intercourse among the states composed of collections of premiums, payments of policy obligations, and the countless documents and communications which are essential to the negotiation and execution of policy contracts"[8] has been suppressed, burdened and obstructed in the state of Georgia.

---

8. *United States* v. *South-Eastern Underwriters Ass'n.*, 322 U. S. 533, 541.

Georgia is a classic example clearly set forth in the pleadings, depositions, and exhibits in the record. Petitioners' conspiracy was nationwide in its scope with less success in other states but in scheme and execution clearly a restraint and interference with interstate commerce. Two such examples shown by the record are the states of Florida and Pennsylvania.

Petitioners' sole rejoinder to these unassailable facts is that the number of insurance companies doing business in Georgia and Florida increased during that period of the conspiracy.

For the year ending June 30, 1951, fifty companies were licensed in the State of Georgia to write this type of insurance. (IV, 2062.) The succeeding year saw seventy-seven companies so licensed. (IV, 2068.) During these periods, eleven of the companies so licensed were Georgia companies. It is apparent that, with so many companies in the field, a battle between companies doing over eight percent of this business with the dollar volume involved was, inevitably, a battle of giants.

The figures become even more impressive applied to the situation in Florida. There, in 1951, Bankers had a volume in excess of two million two hundred thousand dollars, over nine percent of the total premiums received from one hundred and forty-two companies licensed to write accident and health insurance in Florida. (IV, 2656, 2775.) Petitioners, again considered as a group, were again slightly over these figures. In terms of dollar volume and economic significance then, the interstate commerce involved was substantial.

Not one of the cases cited by petitioners sustains the proposition that the public is not injured by the suppression of competition implicit in the elimination of a competitor by his or its competitors pursuant to a conspiracy. The claimed inconsistency between the Court of Appeals

decisions and the decisions of this Court simply do not exist.

The result of this was the elimination of plaintiff as a competitor in Georgia and substantial damage to its ability to compete elsewhere. This affected all policyholders of Bankers regardless of where they lived. As was stated in *United States* v. *Southeastern Underwriters Ass'n.*, 322 U. S. 533, 541:

> "Individual policyholders living in many different states who own policies in a single company have their separate interests blended in one assembled fund of assets upon which all are equally dependent for payment of their policies. The decisions which that company makes at its home office—the risks it insures, the premiums it charges, the investments it makes, the losses it pays—concern not just the people of the state where the home office happens to be located. They concern people living far beyond the boundaries of that state."

The competitive relationship existing *vis a vis* the conspirators and plaintiff brings the conspiracy and injury to plaintiff within the area of public interest—the public is entitled to competition by all and the elimination of a competitor in violation of the Sherman Act does affect that interest. Reduced to an absurdity, petitioners argue that as long as individual companies are picked off, one by one, only at that point where monopoly begins may an action be brought. That is true of a Section 2 action, but a Section 1 action under the Sherman Act reaches restraints on competition prior to the achievement of monopoly. Plaintiff has sufficiently shown a situation affecting the public interest, operating to the public's injury.

In *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U. S. 457, 465, 61 S. C. 703, 707, this Court emphasized:

> "Under the Sherman act 'competition, not combina-

> tion, should be the law of trade.' * * * And among the many respects in which the Guild's plan runs contrary to the policy of the Sherman Act are these: it narrows the outlets to which garment and textile manufacturers can sell and the sources from which retailers can buy * * *."

Also in *Hunt v. Crumboch*, 325 U. S. 821, 824, 65 S. Ct. 1545, 1546, a union case following the *Apex* case, the Court differentiated the situation:

> "Had a group of petitioner's business competitors conspired and combined to suppress petitioner's business by refusing to sell goods and services to it, such a combination would have violated the Sherman Act."

Similar sentiments were expressed in *Associated Press v. U. S.*, 326 U. S. 1, 14; 65 S. Ct. 1416, 1422; 65 L. ed. 2[illegible]:

> "The Sherman Act was specifically intended to prohibit independent businesses from becoming 'associates' in a common plan which is bound to reduce their competitor's opportunity to buy or sell the things in which the groups compete."

This case had another facet paralleled in the case at bar. The defendants in the cited case contended that the proof had failed to show that the press services were indispensable, since the services were available to the public, provided that the public bought a member's newspaper.

This argument finds its counterpart in the claim of defendants that no public injury exists because of the existence of other companies willing to sell similar policies to the public involved. Petitioners would have Bankers prove its "indispensability" in the insurance market, a test which in the *Associated Press* case the Supreme Court disavowed in strong terms (p. 18):

> "We reject these contentions. The proposed 'indispensability' test would fly in the face of the language of the Sherman Act and all our previous interpreta-

> tions of it. Moreover, it would make that law a dead letter in all fields of business, a law which Congress has consistently maintained to be an essential safeguard to the kind of private competitive business economy this country has sought to maintain."

With reference to the alleged conflict between circuits, the effect of quotation from *Wm. Filene's Sons Co.* v. *Fashion Originators' Guild*, 90 F. (2nd) 556, is dissipated by the later case involving the Guild decided by this Court. In *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U. S. 457, 466, 61 S. Ct. 703, 707, this Court expressly disavowed the narrow catalog of offenses under the Sherman Act of the earlier case and came explicitly to a contrary conclusion on the merits.

In their citation of *Interborough News Company* v. *The Curtis Publishing Co.*, 225 F. (2d) 289, the petitioners deemphasize the fact that the quotation is made from the District Court's opinion not referred to by the Court of Appeals. The Court of Appeals 2nd (p. 293) view of the case was reflected as follows:

> "The nub of the matter is that the peculiar features of schemes for price fixing and *elimination of competition* which appear in such leading cases as *Interstate Circuit* v. *United States*, 1939, 306 U. S. 208, 59 S. Ct. 467, 83 L. Ed. 610, *United States* v. *Masonite Corp.*, 1942, 316 U. S. 265, 62 S. Ct. 1070, 86 L. Ed. 1461 and *United States* v. *United States Gypsum Co.*, 1948, 333 U. S. 364, 68 S. Ct. 525, 92 L. Ed. 746, are wholly absent here." (Emphasis supplied.)

Undoubtedly that Court would be surprised to have its decision cited as contrary to the holding here where elimination of competition is the "nub of the matter."

The opinions of the Courts of Appeals in *Hunt* v. *Crumboch*, 43 F. (2nd) 902, and *Leader* v. *Apex Hosiery*, 108 F. 2d 71, even if given the effect contended for by petitioners

are limited by this Court's opinions in these same cases which have been hereinbefore cited. This Court, in each instance, was careful to point out that there was not involved a conspiracy of competitors to eliminate another competitor.

Schwing Motor Company v. *Hudson Sales Corp.*, 239 F. (2nd) 176; *Miller Motors, Inc.* v. *Ford Motor Company*, 252 F. (2nd) 441; *Klon's Inc.* v. *Broadway-Hale Stores*, 255 F. (2nd) 214; *Shotkin* v. *General Electric Co.*, 171 F. (2nd) 236; *Feddersen Motors, Inc.* v. *Ward*, 180 F. (2nd) 519; and *Hudson Sales Corp.* v. *Waldrip*, 211 F. (2nd) 268, cited by defendants, also do not involve a conspiracy by competitors to eliminate a competitor. The issue in every case was whether or not refusals to do business with particular dealers were violative of the antitrust laws. There can be no doubt that if, in terms of the *Schwing* case, the circumstances revealed a plot by competitors such as General Motors and Ford to eliminate the sale of Hudson automobiles in the area involved, it would have been illegal and violative of the antitrust laws.

Two other Court of Appeals' opinions, *Riggall* v. *Washington County Medical Society*, 249 F. (2nd) 266, and *Kinnear-Weed Corp.* v. *Humble Oil and Refining Co.*, 214 F. (2nd) 891, cited by defendants do not establish the claimed conflict. In the first case, the Court pointed out that the plaintiff in the practice of his profession was not engaged in trade or commerce within Section 1 of the Sherman Act and had not been prevented from practicing that profession. These observations immediately preceded its observations relative to the "injury to the general public economically." 249 F. (2nd) 266, 268. In the second case, the Court was dealing with a general allegation of injury to the public by a violation of the patent laws. Clearly, the Court was correct in holding that that was not the type of public purpose protected by the antitrust laws.

The Padovich Case.

The petitioners feel that the Court of Appeals was "unduly influenced" by the opinion of this Court in *Radovich* v. *National Football League*, 352 U. S. 445. Petitioners further attribute to respondent the argument that after *Radovich* a single competitor in a competitive field could recover for injury, even if the public is not injured.

It is to be expected that the Court would be influenced by the *Radovich* case and would follow its principles. As for the paraphrase of respondent's argument, petitioners miss the point. Elimination of a competitor, through a conspiracy to restrain trade in interstate commerce injures the buying public and is an actionable violation of the antitrust laws which were designed to prohibit such activities.

It is believed that this is and was the law prior to *Radovich* and that *Radovich* is important because of the negation of the "public injury" implicitly contained in its reversal of the Court of Appeals.

The Court of Appeals in *Radovich* had in part rested its decision on the lack of public prejudice. 231 F. 2d 620, 623. The United States appeared as *amicus curiae* in the Supreme Court expressly and explicitly with reference to the "public injury" question.

There thus can be no doubt that it was in response to the Court of Appeals opinion and to the interpretation argued for by *amicus* that the Court said at pages 453, 454:

> "Petitioner's claim need only be 'tested under the Sherman Act's general prohibition on unreasonable restraints of trade,' *Times-Picayune Publishing Co.* v. *United States*, 1953, 345 U. S. 594, 614, 73 S. Ct. 872, 883, 97 L. Ed. 1277, and meet the requirement that petitioner has thereby suffered injury. Congress

has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. These laws protect the victims of the forbidden practices as well as the public. *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 1948, 334 U. S. 219, 236, 68 S. Ct. 996, 1006, 92 L. Ed. 1328. Furthermore, Congress itself has placed the private antitrust litigant in a most favorable position through the enactment of §5 of the Clayton Act. *Emich Motors Corp.* v. *General Motors Corp.*, 1951, 340 U. S. 558, 71 S. Ct. 408, 95 L. Ed. 534. In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws."

Petioners attempt to limit the scope of the *Radovich* opinion by insistence on its application only in a case where the conduct is, *per se*, a violation of the Sherman Act. The flaw in this argument is that the restraint in the *Radovich* case was to be "tested under the Sherman Act's general prohibition of *unreasonable restraints* of trade." (Emphasis supplied.)

Even assuming the *Radovich* case involved a *per se* violation of the Sherman Act, Petitioners' position is not improved. It may be confidently and categorically stated that a conspiracy of competitors to eliminate another competitor is in itself an unreasonable restraint of competition. When, as here, the conspiracy results in the elimination of a competitor engaged in interstate commerce, to its damage, the right of action is complete.

The Propriety of Summary Judgment.

The sole basis for summary judgment now insisted upon relies on the "public injury" argument treated in the foregoing. Since petitioners' arguments have, in the words of the Court of Appeals, "completely misconceived and misapplied the principle they invoke" the premise on which they rely in this regard has no validity. It should be noted however, that, with reference to the "public injury" argument, the Court of Appeals found both allegations and proof tending to establish the truth of the allegations in support of public and private injury.

This finding is not objected to, but instead petitioners attempt to palm off on this Court the impression that respondent Bankers failed to make proof of its allegations in this aspect and that the Court reversed the summary judgment on the basis that it might better its case before trial. The opinion itself refutes petitioner.

CROSS-PETITIONER'S CLAIMS.

The Cross Petition filed herein by Respondent-Cross-Petitioner, Hartford Accident and Indemnity Company, attempts to create an "either, or" situation resulting in its conclusion that the Court of Appeals should have, as to it, affirmed the Summary Judgment.

Its argument is, that the actions complained of were either under the immunity afforded by the official status of its principal, Cravey, or were private acts for which the surety is not liable. A vague intimation is also made that, since Cravey is no longer a party to the suit, there is no longer any right of action against it as surety.

This argument, for rather obvious reasons, fails to point out to this Court the Georgia Statutes governing

Cross-Petitioner's obligations. Section 89-418 of the Georgia Statutes Annotated, follows:

> "Conditions of Liability.—Every official bond executed under this Code is obligatory on the principal and surety thereon. * * *
>
> 4. For the use and benefit of every person who is injured, either by any wrongful act committed under color of his office, or by his failure to perform, or by the improper or neglectful performance of those duties imposed by law."

Thus, Georgia law expressly permits an action by anyone injured by a wrongful act or the improper performance of an act by the public officers of Georgia, (See Chapter 89-4 of the Code of Georgia generally). Further, Georgia is probably unique in that a direct action against the surety is permitted without a joinder of the principal, or without first obtaining a judgment against the principal. *Zachry* v. *City Council of Augusta*, 78 Ga. App. Reports, 746, 749.

Astonishingly enough, cross-petitioner cites *Culpepper* v. *U. S. Fidelity & Guaranty Co.*, 199 Ga. 56, 33 S. E. 2d 168, and quotes the holding of the Court that a cause of action will lie against a surety *only* when the harmful acts are done by virtue of or under color of office. This holding is in square opposition to cross-petitioner's theory of official immunity.

The McCarran Act.

Cross-petitioner also states that the McCarran Act (Title 15, Sections 1011-1015) requires reversal of the Court of Appeals. Nothing in the Act itself is pointed out as requiring this reversal. Indeed, Cross-Petitioner admits (P. 3, Cross-Petition):

> "The provision of the McCarran Act which reserves jurisdiction under the Sherman and Clayton Acts in

cases of conspiracy applies to conspiracies which affect the public interests, the subject which was before the Court in the *Southeastern Underwriters* case".

This statement qualifies as an admission against Cross-petitioner's interest, an admission that the proviso of Sec. 1012 of the Act is applicable.

The Georgia Insurance Commissioner.

In view of the description of the activities of Cravey, the assertion by Cross-Petitioner that the extensive powers of the Insurance Commissioner somehow authorize or immunize these activities must create some wonderment as to the Georgia law. As the Court of Appeals noted:

> * * * "There is no authority, statutory or otherwise, authorizing the Insurance Commissioner of Georgia or Florida to conspire with persons to restrain commerce or exempting them from such if they do so * * *"

If so authorized, the supremacy of Federal law would require that the authority of any such State law must yield. *Solo Electric Co.* v. *Jefferson Electric*, 117 U. S. 173, 186.

CONCLUSION.

Neither Petitioners nor Cross-Petitioner have undermined the legal propriety of the decision of the Court of Appeals. Since no conflict exists and since the Court of Appeals opinion is in full harmony with views expressed on many occasions by this Court, the Petition and the Cross-Petition should be denied.

All of which is respectfully submitted.

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Office Supreme Court, U.S.
FILED
SEP 18 1958
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,
Petitioner,
v.
RESERVE LIFE INSURANCE COMPANY, GEORGE WASHINGTON LIFE INSURANCE COMPANY, PROFESSIONAL INSURANCE CORPORATION, BANKERS LIFE AND CASUALTY COMPANY, and J. EDWIN LARSON,
Respondents.

No. 377

CROSS PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals,
Fifth Circuit.

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IN THE

SUPREME COURT OF THE UNITED STATES.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,

Petitioner.

v.

RESERVE LIFE INSURANCE COMPANY, GEORGE WASHINGTON LIFE INSURANCE COMPANY, PROFESSIONAL INSURANCE CORPORATION, BANKERS LIFE AND CASUALTY COMPANY, and J. EDWIN LARSON,

Respondents.

No. .....

CROSS PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals, Fifth Circuit.

Hartford Accident and Indemnity Company hereby petitions this Court for a cross-writ of certiorari to the United States Court of Appeals for the Fifth Circuit, and makes respondents thereto Bankers Life and Casualty Company, J. Edwin Larson, Reserve Life Insurance Company, George Washington Life Insurance Company, and Professional Insurance Corporation.

Your petitioner shows:

(a) This petitioner is one of the parties named in the petition for a writ of certiorari filed by Reserve Life Insurance Company et al., which has been docketed in this Court as No. 272 of the October Term, 1958. The petitioner is one of the defendants in the original case above referred to.

(b) The opinion of the Court of Appeals for the Fifth Circuit rendered June 30, 1958, appears as Appendix A to

the original petition for certiorari in this case, filed by Reserve Life Insurance Company et al. in Case No. 272.

(c) The matters on which petitioner relies appear entirely in the pleadings and record filed by petitioners in Case No. 272 and no additional record is necessary.

(d) The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by certiorari and to pass on the additional questions made by this cross-petition is 28 U. S. C., § 1254 (1).

The Questions Presented for Review:

(1) May the surety on the bond of a public state official payable to the Governor of the State and conditioned only for the faithful performance of duty by the public official be sued in a Federal District Court in another State in an action for treble damages for an alleged conspiracy in restraint of trade of the business of life, accident, health and hospitalization insurance, where the public official is not a party defendant, and no suit is pending against him as principal on the bond, and where the alleged wrongful acts which constitute the basis for the action were done outside the duties and jurisdiction of the public official?

(2) Does a public officer's immunity from suit for matters done in discharge of his duties or under color of his office inure to the benefit of the surety?

Statement of the Case:

For the purpose of this petition, the statement of the case made by the Court of Appeals in its decision below is sufficient. The opinion appears in the record and as Appendix A to the brief of the petitioners in Case No. 272.

In the District Court there was a summary judgment in favor of the defendants, after motion made by this defendant, now petitioner, to dismiss the case against it

upon the pleadings, and after motions by the other defendants based upon depositions and affidavits, as well as the pleadings. The Court of Appeals reversed, holding that the case was not one for summary judgment.

The defenses of this petitioner, which are summarized by the Court of Appeals as a footnote to its opinion and appear on page 7 of Appendix A of the brief of the petitioner in Case No. 272, were neither considered nor passed upon.

The following legal principles are believed to be controlling and require a reversal of the judgment of the Court of Appeals and an affirmance of the decision of the District Court:

1. The McCarran Act, passed by Congress following the decision of this Court in the **Southeastern Underwriters** case (322 U. S. 533), removed the business of insurance from the scope of the Sherman and Clayton Acts to the extent that such business was regulated by State law.

This statute, insofar as it applies to advertisements by insurance companies, was recently construed by this Court in **Federal Trade Commission v. American Hospital and Life Insurance Company**, 350 U. S. 560, in which the judgment of the Fifth Circuit was affirmed.

The provision of the McCarran Act which reserves jurisdiction under the Sherman and Clayton Acts in cases of conspiracy applies to conspiracies which affect the public interest, the subject which was before the Court in the **Southeastern Underwriters** case.

2. The acts of the Insurance Commissioner of Georgia are partly administrative and partly judicial. His actions are not subject to review by the Court.

3. This petitioner is not liable if the principal on the bond, Zack Cravey, the Insurance Commissioner, is not liable.

4. Construing the pleadings as they were construed by the Court of Appeals in its holding that the aforesaid defenses were not available to the Insurance Commissioner because the alleged wrongful acts were personal acts done as a part of the conspiracy against the plaintiff, it follows that there is no liability on the part of this petitioner since its bond does not cover personal wrongs done by the principal, but only wrongs done by the Insurance Commissioner in the discharge of the duties of his office or under color of his office.

The Question of Public Interest:

The decision below gives rise to two questions of public interest:

(a) The effect of the decision of the Fifth Circuit in this case is to reverse the rulings of this Court in other cases dealing with all of the questions presented; and it is in direct conflict with previous decisions of the Fifth Circuit.

(b) It raises a question of particular importance, not only to the surety company that is petitioner herein, but to all sureties on bonds of public officials.

The penalty of this bond is $20,000 and it must be assumed that under ordinary circumstances the surety's liability would be asserted in the State where the bond was executed and by the public official who is the obligee; in this case the Governor of Georgia. But, if the principle announced by the Fifth Circuit is allowed to stand, a surety company may be sued on such a bond in any District Court in the United States. It may be made a party, as it was here, in an action claiming damage to the amount of $30,000,000. It is important that public officials and their sureties know the extent of the liability incurred by them when they file bonds complying with local statutes.

ARGUMENT.

Petitioner was named as a defendant in this case as the surety on the official bond of a public state official, Zack D. Cravey, as Comptroller General of the State of Georgia, and was sued solely in its capacity as such surety.

The Comptroller General of Georgia is a constitutional officer elected by the people. By virtue of his office, he is Insurance Commissioner. His duties as Insurance Commissioner are statutory.

Zack D. Cravey, who then held and now holds office as Comptroller General and Insurance Commissioner, was named as a defendant—not in his official capacity, but in his personal capacity. This petitioner, as surety on his bond, was joined.[1]

The bond of the Comptroller General is "conditioned for the faithful performance of all of the duties of his said office and all such duties as shall be required of him by the General Assembly or the laws of this State, and for a faithful account of all the public moneys and effects that may come into his hands during his continuance in office." Ga. Code, §§ 40-502, 40-1402.

Courts uniformly deny recovery of damages from public officials on account of acts done under color of office.

The powers conferred upon the Comptroller General of Georgia in his capacity of Insurance Commissioner are very

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[1] As to Cravey, but not as to his surety, the action was transfered to the Northern District of Georgia. See **Bankers Life & Casualty Co. v. Holland**, 346 U. S. 379. Cravey ceased to be a party to the Florida case. As to Cravey, the case was dismissed by the plaintiff after the transfer, and before answer.

Plaintiffs' right of action against Cravey is now barred. 15 U. S. C. A., § 15b, Act of July 7, 1955, 69 Stat. 283.